

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:) 01-MDL-875
)
ASBESTOS LITIGATION,)
)
) Philadelphia, PA
) August 1, 2012
) 4:50 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE MAGISTRATE JUDGE DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: MICHAEL P. CASCINO, ESQUIRE
ROBERT G. MCCOY, ESQUIRE
ALLEN D. VAUGHAN, ESQUIRE
CASCINO VAUGHAN LAW OFFICES, LTD.
220 South Ashland Avenue
Chicago, IL 60667

For the Defendants: DAVID SETTER, ESQUIRE
General Electric, FORMAN, PERRY, WATKINS, KRUTZ
et al. & TARDY, LLP
Denver Financial Center
1775 Sherman Street
Suite 1900
Denver, CO 80203

For the Defendants: JENNIFER N. STUDEBAKER, ESQUIRE
Asten, Industrial FORMAN, PERRY, WATKINS,
Holdings, Unifax, KRUTZ & TARDY, LLP
Owens-Illinois, City Centre
Uniroyal, etc. Suite 100
South Lamar Street
Jackson, Mississippi 39201

For the Defendants: CAROL PERKINS, ESQUIRE
Union Carbide Corp. HEYL ROYSTER
and CertainTeed Corp. Suite 600
Chase Building
124 S.W. Adams Street
Peoria, IL 61602

EXHIBIT

tabler

28

(Appearances continued)

For the Defendants: KAITLIN N. CHENEVERT, ESQUIRE
Proctor & Gamble, SWANSON, MARTIN & BELL, LLP
Commonwealth Edison 330 North Wabash Street
Suite 3300
Chicago, IL 60611

For the Defendants: SEAN P. FERGUS, ESQUIRE
John Crane and O'CONNELL, TIVIN, MILLER &
Cleaver-Brooks BURNS, LLC.
135 South LaSalle Street
Suite 2300
Chicago, IL 60603

For the Defendants: WILLIAM L. SHENKENBERG, ESQUIRE
Riley Power, Inc. MALLERY & ZIMMERMAN, S.C.
731 North Jackson Street
Suite 900
Milwaukee, Wisconsin 53202

For the Defendants: MICHAEL W. DRUMKE, ESQUIRE
Georgia-Pacific BRIAN J. HUELSMANN, ESQUIRE
HEPLER BROOM, LLC
150 North Wacker Drive
Suite 3100
Chicago, Illinois 60606

Audio Operator: MILAHN HULL

Transcribed by: DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
Office: (856) 435-7172
Fax: (856) 435-7124
E-mail: dianadoman@comcast.net

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

1
2
3
4
5

I N D E X

PAGE

Telephone conference

4

Colloquy

4

1 (The following was heard in open court at 4:50 p.m.)

2 THE COURT: Counsel, good afternoon. It's just
3 Strawbridge. Let me confirm the role. Allan Vaughan, Mike
4 Cascino, Bob McCoy.

5 MR. CASCINO: Yes, Your Honor.

6 THE COURT: Dave Setter, Danny Mulholland, Kaitlin
7 Chenevert, Brian Huelsmann, Carol Perkins, and Bill
8 Shenkenberg. Anybody whose name I did not call?

9 MS. STUDEBAKER: Yes, Your Honor. This is Jennifer
10 Studebaker.

11 THE COURT: Ms. Studebaker.

12 MR. DRUMKE: Good afternoon, Your Honor. It's Mike
13 Drumke.

14 THE COURT: Good afternoon, Mr. Drumke. Anybody
15 else?

16 (No audible response)

17 THE COURT: Okay. Let's talk first of all about the
18 Sadek, Anderson, and Schonfeld issue. I want to tell you what
19 my intention is, and then I will give you an -- a brief
20 opportunity to react, if you care to do so, and it is my -- and
21 I will then -- I think then I will have to, you know, enter an
22 order that will reflect all this, which we'll work on, probably
23 get entered some time tomorrow.

24 Having been through what I have seen from both sides,
25 and I guess the most robust one from Mr. Setter with respect to

Colloquy

5

1 the implications of the A012 orders and the -- and the other
2 voluntary dismissals by the plaintiffs, I -- I think, frankly,
3 I'm concurring with what I believe has been the collective
4 judgment with some modification of all counsel that the
5 continuing to pursue the SOS -- the SAS limine question in the
6 fashion that we have been doing it does not make as much sense
7 as it did a year ago and even perhaps a month ago.

8 So accordingly, I will enter an order that will --
9 will vacate those aspects of the SAS scheduling order, and I
10 need to be careful, because I've got to look at it real
11 carefully but to vacate -- to vacate the essence of it, at
12 least with respect to the necessity for filing this motion on
13 August the 10th, which is the next deadline. I think I
14 indicated it was likely I was going to do that anyway, and the
15 necessity for a hearing on August the 25th, and, you know,
16 those other things that we had in the scheduling order
17 pertaining to it.

18 But I will -- I'm not prepared to agree with the
19 suggestion that has been made by the defendants with respect
20 to, as I -- as I read it, kind of instead of discontinuing this
21 operation, just pushing it back for a period of about six weeks
22 and deferring an SAS motion until some time in November. That
23 would play out into the new year, and I believe that the
24 appropriate way to do this now and the most efficient way with
25 respect to dealing with motions for summary judgment, although

1 it may require some modification, which is why I want to tell
2 you about this before I put it down into an order, is to have
3 any remaining challenge with respect to Sadek/Anderson -- or
4 Schonfeld and Anderson. I got the implication, at least Mr.
5 Setter feels that Sadek is not part of this anymore, but in any
6 event, that have that be done in the normal context or normal
7 for these MDL asbestos cases, which is that the issues would be
8 teed up as part of the motion for summary judgment, which would
9 constitute a challenge to a causation expert. So it would be,
10 in effect, you'll think of it as a motion in limine, but as --
11 as we've been trying to relate here, these -- these motions or
12 these issues that challenge the experts will be done in the
13 context of an individual's -- individual motion for summary
14 judgment.

15 Now, I see that there might be some -- there is a
16 couple questions, I think, that would -- one would need to
17 address with respect to that, and among the first, of course,
18 would be that there are already pending and filed motions for
19 summary judgment, and because of the -- some of the uncertainty
20 with respect to this and then the recent order that we've
21 entered with respect to the necessity for joinders, that we
22 would -- were inclined to require that supplemental motions for
23 summary judgment be filed that would address just this issue as
24 a -- as an additional basis for summary judgment if that's what
25 defendants feel they -- they want to do, and I would have them

Colloquy

7

1 be -- require that they be filed in whatever few cases there
2 are in CVLO-1 and 2, and I guess it impacts 3 and the top --
3 whatever is in the top 10, a couple in the top 10, I think, and
4 have them filed by the 10th of August.

5 Now, I would have thought that there would be some
6 way in which there might be the opportunity to do some form of
7 consolidation with respect to that and probably aspects of what
8 it is that the defendants wanted to say and how the plaintiffs
9 might want to respond that are going to take in more universal
10 concepts and take in things that you've now -- whatever you've
11 now all learned by way of the discovery that's been undertaken,
12 but to the extent that discovery has been -- has been -- has
13 been undertaken as of now, has been completed as of now, it
14 seems to me that it's -- it's something that you ought to be
15 able to do in connection with the August end date. I'm
16 thinking about whether or not it has any implications with
17 respect to any other experts and finishing expert reports,
18 which it may, and I don't know about that.

19 But that's the -- that's the general way in which we
20 would intend to proceed. Let me also say, because it is a
21 connection with this, but it's a separate topic, is having
22 given consideration to the various proposals that were
23 discussed and you guys have discussed that arose out of the
24 July 13th meeting, I think that there is -- well, there is --
25 while I do think that there is potentially some rational for

Colloquy

8

1 making some adjustments in the schedule that Mr. McCoy has
2 recommended to us, I've become convinced that -- that the --
3 the benefit that the plaintiffs might be able to get with some
4 adjustments is a benefit that they could still achieve based
5 upon or still could achieve in connection with the discovery
6 process that are now set out, and I'm concerned about the
7 disruption of scheduling orders that have been in place now for
8 -- for some time.

9 So I am -- I'm not going to make any adjustment to
10 the scheduling orders, and although that was never -- that's
11 not part of a current motion in front of me that has been
12 discussed, and I will enter an order that will at least reflect
13 that this issue come up, and it has been informally briefed,
14 and I've been -- each parties have had an opportunity to
15 present what they wanted to present, but we are -- we're not
16 going to make any adjustments into the current schedule.

17 So those I think were the two principal topics that
18 we were asked to address today, and that's my view. Now, I'll
19 give anybody who wants to step forward and have any -- make any
20 comment about any of that or question about any of that, now is
21 your time.

22 MR. MULHOLLAND: Your Honor, this is Dan Mulholland.
23 In addition to the -- what we submitted to the Court, or Mr.
24 Setter did, a proposed order at the end of last week which
25 reflected that I think the premise for this entire discussion

Colloquy

9

1 about the SAS cases, that is, that -- that CVLO had withdrawn
2 the Schonfeld, Anderson, and Sadek A012 reports in the 17
3 pending cases, and had withdrawn Sadek as an expert --

4 THE COURT: Right.

5 MR. MULHOLLAND: -- and that CVLO had replaced the
6 Schonfeld, Anderson, and Sadek A012 reports in the 17 pending
7 cases --

8 THE COURT: Right.

9 MR. MULHOLLAND: -- new expert reports. Those --
10 those two things -- if those are not -- if those do not
11 accurately reflect the state of affairs, then we need to be
12 having an entirely different discussion. I believe, however,
13 they do accurately reflect the state of affairs, but that they
14 are now expressly reflected in the record, and we prepared the
15 order to memorialize that state of affairs so that we will not
16 have to -- there won't be any doubt about it as, you know, in
17 the future, because again, it's fundamental. We -- we've got
18 to -- we need to go in one of two directions at this point
19 depending upon whether those things are true, and we think they
20 are true, and if we're not -- if they're not, we need to know
21 about it.

22 So my two cents worth is that whatever the schedule
23 is going forward regarding, you know, motions in the remaining
24 cases, we need to memorialize where we are today and, in
25 essence, how we got there, we think our order neutrally and

Colloquy

10

1 accurately does, so that there won't be any question about it.

2 THE COURT: Well, I hear what you say, Mr.

3 Mulholland, but I'm not sure that I understand the need for it.

4 What we're -- what we're -- what we're -- I mean, isn't it the

5 case that what we're dealing with is that if you have motions

6 that you want to file with respect to Sadek, Schonfeld, and

7 Anderson, presumably, you're doing that because you have

8 learned that whatever new information has been provided to you,

9 that they are still going to be witnesses, there are causation

10 reports, whatever it is that they have, which has been provided

11 to you presumably by way of discovery, by way of expert

12 reports, whatever it is that they've done, which is all done or

13 should have been done in connection with the -- all the cases

14 up until -- well, certainly, CVLO-1 and 2 and CVLO-3, I

15 believe. All the deadlines for all that business has -- has

16 passed, and if they don't have anything in there with respect

17 to those witnesses or those experts, then they're not going to

18 be able to use those experts. If they have something in there

19 with respect to those experts, they are going to have to rely

20 upon what it is they have they're going to rely upon, and if

21 you choose to challenge it, then you challenge it.

22 So I'm not --

23 MR. MULHOLLAND: Your Honor --

24 THE COURT: And we are going to reflect a little bit

25 of a history. It would be my intention to reflect a little bit

Colloquy

11

1 of the history, but I'm just not --

2 MR. MULHOLLAND: Well, to put a finer point on it --

3 THE COURT: Go ahead.

4 MR. MULHOLLAND: -- we have time and again had to
5 come to this Court and reargue and reargue points that have
6 already been ruled upon. Within the last week, I believe, this
7 Court has entered an order to the effect that a position taken
8 by Cascino Vaughan had already been resolved by the Court in a
9 prior order.

10 So I can easily imagine a circumstance a month down
11 the road, six months down the road, maybe in a transferor Court
12 where these A012 reports from Schonfeld, Anderson, and Sadek
13 resurface as the operative document and we'll say well, no,
14 they're gone, they were withdrawn, and then they'll be an
15 argument, no, they weren't withdrawn, and then the question
16 will be were they withdrawn or were they not withdrawn, and
17 we're all operating on the premise now that they have been
18 replaced.

19 If that's true, then there should not be any big step
20 to make that part of the record. We need that part of the
21 record, or we're going to have this issue -- we're going to
22 have to revisit this issue in the near mid-term or long-term
23 future. That's my simple point, and history proves that that's
24 going to happen.

25 THE COURT: Well, Mr. Mulholland, as you probably

Colloquy

12

1 have observed, I find it quite a challenge to try to do my best
2 to keep on top of this with respect to things that have, in
3 fact, already happened and make rulings based upon them, and
4 now you're asking me to try to do something that reflects
5 something with respect to history with respect to some kind of
6 a confirmation that you now want as to something that has not
7 yet happened and may or may not happen in the future.

8 That's the way I'm hearing what you're asking me to
9 do. I --

10 MR. MULHOLLAND: Absolutely not, Your Honor.

11 THE COURT: I don't know how I can --

12 MR. MULHOLLAND: I'm asking you to -- to confirm --
13 to -- so that we can have a confirmation in the record of
14 something that has already happened, and if the plaintiffs step
15 up and say well, no, that hasn't happened already, then we need
16 to know that, and the Court needs to know that. We need to
17 know it on this telephone conference.

18 THE COURT: You -- just -- first of all, kind of
19 lower your temperature a little bit, if you don't mind. What
20 is it that -- I mean, give me a specific example of what you
21 think has been represented that you're afraid might change.

22 MR. MULHOLLAND: The two things that I mentioned,
23 paragraphs 6(c) and 6(d) in our proposed order. I can read
24 them again and I'm happy to read them again, but I assume you
25 have the order there before you.

Colloquy

13

1 THE COURT: I do. Hang on a minute. Let me just
2 grab it. Yeah. All right. So -- so in paragraph 6, you
3 reflect that Judge Robreno dismissed a number of cases. Okay.
4 What --

5 MR. MULHOLLAND: Paragraph 6(c), paragraph 6, sub
6 paragraph (c).

7 THE COURT: 6(c), CVLO is withdrawn, those A012
8 reports in 17 pending cases, and -- okay. And -- and just --
9 just give me -- because shame on me for being stupid, but the
10 basis for that statement that you have made, is it in a written
11 form? What's the specific -- what's the specific basis for
12 that statement?

13 MR. MULHOLLAND: Well, there -- we had a hearing last
14 week, and you asked that question I believe to Mr. McCoy during
15 that hearing, and I believe that Mr. McCoy confirmed that
16 during the hearing, that those reports had been withdrawn and
17 replaced by the new reports, but that -- that's not reflected
18 elsewhere in the record, and a stranger to this record, as a
19 transferor Court would be, would have a very difficult time
20 parsing all that out.

21 Now, if those reports had not been withdrawn, that
22 is, if that is really an issue, then we need to be filing a
23 Daubert motion on August 10th. If, however, they have been
24 withdrawn, then no Daubert issue is necessary, but we need to
25 know what the state of affairs is so we don't have to revisit

Colloquy

14

1 the issue down the road.

2 THE COURT: All right. You're -- you say that they
3 have withdrawn Schonfeld, Anderson, and/or Sadek A012 reports
4 in the 17 pending cases and had withdrawn Sadek as an expert.
5 All right. Now, the 17 pending cases that you're talking
6 about, what -- what -- which group of CVLO cases are those 17
7 cases in? What's your understanding of that?

8 MR. MULHOLLAND: They were 17 of the 50 SAS cases.
9 They're listed on Exhibit B to the order we provided to you
10 last week, proposed order we provided to you last week.

11 THE COURT: Yes. Yes.

12 MR. MULHOLLAND: They are the ones that they did
13 replacement reports in.

14 THE COURT: Yes. Okay. And they were spread through
15 -- what I'm trying to get to is I'm -- I want to -- I need to
16 relate this to the scheduling orders. Are these 17 pending
17 cases in scheduling orders where the discovery is still open?

18 MR. SETTER: Your Honor, Dave Setter. I believe they
19 are.

20 THE COURT: Okay. So you're telling me now that
21 you're concerned that in some of those cases, even though they
22 say they -- they are -- they say they withdrew the reports and
23 you want them to confirm that now, you're concerned that they
24 might come back and refile the reports or file some other
25 report within the discovery period within which they would be

1 permitted to do it in CVLO-7. Is that what your concern is,
2 Mr. Mulholland?

3 MR. MULHOLLAND: Actually, what my -- that's one of
4 them, but another concern will be, well, you know, I can hear
5 this argument at some point being made down the line by CVLO,
6 something along the lines of well, you know, these reports are
7 no -- are no secret, they never were a secret to anybody, we
8 submitted them in response to A012 and they've been there, and
9 so we just don't really know what you're talking about when you
10 say they've been withdrawn.

11 THE COURT: I don't understand this. You know, I've
12 got to tell you, Mr. Mulholland, I'm --

13 MR. MULHOLLAND: Your Honor, let me try again,
14 because --

15 THE COURT: I'm puzzled by this.

16 MR. MULHOLLAND: -- there is not --

17 THE COURT: I'm puzzled by this. Look --

18 MR. MULHOLLAND: This is a real risk.

19 THE COURT: Look. Look. Look. Wait a minute. Wait
20 a minute. Let me try again. Let me try again. What I'm
21 saying is if you have some reason that you believe that Sadek,
22 Anderson, whatever it is that you want to do with respect to
23 those particular experts need to be the subject of a motion in
24 limine, then you file your motion in limine in the context of a
25 motion for summary judgment in a particular case. That's -- I

1 think that's relatively simple.

2 And sure, if, in fact, Mr. McCoy said something a
3 week ago with respect to what his -- what he was -- what he was
4 doing at that point and these things were withdrawn and you've
5 relied upon that to some extent and he goes back on that for
6 some reason, we'll deal with that, but you're asking me to deal
7 with this in too much of a hypothetical that I am unable to
8 fathom as to how I'm supposed to construct some kind of a
9 response. That's my difficulty.

10 If you want me to ask Mr. McCoy whether or not he
11 intends to be bound by a statement that he was withdrawing
12 Sadek and Anderson reports in 17 cases as you set out in your
13 proposed order, I will ask him. Mr. McCoy, is that something
14 that you still intend to do, and is that what you meant when
15 you said it? Is he on the line?

16 MR. MCCOY: I don't have -- Judge, yes. I don't have
17 the context of the statement in front of me. Whatever was said
18 back then, I mean, we stand by that statement, whatever context
19 it was in. Sure. We stand by it.

20 MR. CASCINO: Well, Your Honor, this is Mike Cascino.
21 I'm not sure if I -- I thought that at least from reviewing
22 notes from the meetings, that that referred to these 17 cases.
23 I don't think we can -- I think what the other sides wants is
24 that we cannot say that Dr. Sadek is able to be used for A012
25 purposes. That's what I think they're -- they're saying, and,

Colloquy

17

1 you know, no. If there is an A012 motion coming up in the
2 future and Dr. Sadek did a report, we're going to rely upon it.

3 THE COURT: No. No. No. No. No. No. No. No.
4 No. No. No. No. No. No. No. Let's --

5 MR. CASCINO: A012 purposes.

6 THE COURT: Let's distinguish A012 from the expert
7 reports. The A012 period is over and done with.

8 MR. CASCINO: Right.

9 THE COURT: What is in the A012s is in the A012s.
10 Judge Robreno has made --

11 MR. CASCINO: Right.

12 THE COURT: -- quite a few rulings. To the extent --
13 yeah. That's all been resolved. What I'm talking about --

14 MR. CASCINO: I -- I agree. I was just saying in
15 terms of those future -- I don't know if there is another A012
16 ruling coming down -- you know, coming down the road in the
17 future, you know, but -- but -- you know, and we'll have Judge
18 Robreno -- if he wants to rule against them, he rules against
19 them.

20 THE COURT: My -- my understanding is that all of the
21 outstanding A012 motions have been ruled upon. Is that
22 consistent with your understanding, Mr. Setter.

23 MR. SETTER: I believe that is the case with the
24 exception of maybe five or six that are pending, five or six
25 cases.

Colloquy

18

1 THE COURT: All right. Well, I think we thought that
2 they were all done, and maybe if there are five or six, they
3 just might be ones that were missed. I'm not sure, but I
4 thought they were all done.

5 But -- so Mr. Mulholland, are you -- you're -- if
6 you're talking about something that they might do with respect
7 to the implications of A-12, that's one of the reasons why I'm
8 a little bit puzzled, because that's all history, and if they
9 -- they're not going to be able to -- they won't be successful
10 if they try to do anything with respect to the A012s. All
11 those motions have been decided and ruled upon.

12 MR. MULHOLLAND: I'm not -- that's not at all what
13 I'm talking about.

14 THE COURT: Well, either --

15 MR. MULHOLLAND: What I'm talking about is neither
16 ethereal or hypothetical or any of that. I'm trying to
17 memorialize an event, which I think has already happened,
18 because it's not otherwise memorialized in the record, and
19 might therefore, be a question for some Court, either this
20 Court or a later Court down the road.

21 It's not a hypothetical. It's an event that's
22 already happened. It's, in fact, why we're here today, and the
23 reason we're here today is we all think that things have
24 changed with respect to the SAS issue.

25 THE COURT: Well --

Colloquy

19

1 MR. MULHOLLAND: Although, frankly, the plaintiffs
2 have -- I'll be quiet if you want me to. I've said this
3 already, but the -- because the plaintiffs have filed
4 replacement reports. If things haven't changed, we need to
5 know that, and either way, we need to memorialize --

6 THE COURT: I don't understand.

7 MR. MULHOLLAND: -- I believe, I submit to you, what
8 has happened. Already, not theoretically, not hypothetically,
9 but in the past, what has happened.

10 THE COURT: If they filed -- if they -- if they -- if
11 they say that they've withdrawn the reports and they've
12 submitted substitute reports, what is it you want? You want
13 them to -- you want them to fall on a sword and make some kind
14 of a confession?

15 I don't -- I don't get the point of this. Frankly, I
16 think it's -- it's -- I just don't get it. I don't understand
17 why you're so upset about something which you've essentially
18 prevailed upon. I don't get what you want.

19 MR. MULHOLLAND: Okay. I want that statement.
20 That's nowhere -- it's implicit in the record. One can deduce
21 it from the record, perhaps.

22 THE COURT: Well, then deduce it.

23 MR. MULHOLLAND: It's nowhere explicit in the record.

24 THE COURT: Then deduce it. If you can deduce it,
25 deduce it. I -- I like -- I likewise will likely deduce it,

1 but you're not -- you want to ask Mr. McCoy. Mr. McCoy
2 responded by saying he wants to -- you know, he doesn't know it
3 in the context of what it was, but whatever it is, it is. I
4 just don't -- I just don't get it, and I don't know, frankly,
5 how you've got me off on this sort of -- I see it kind of a
6 side question. I don't see the centrality of that to this
7 issue.

8 Explain to me why that's central to this issue. What
9 is it -- what is it that you're afraid of? You're afraid that
10 he's going to come forward with some new and different report
11 or try to come back and say I'm going to put this report now in
12 as an expert report in a later case? Is that what you're
13 concerned about?

14 MR. MULHOLLAND: It can be either, but it can
15 certainly be the latter of the two.

16 THE COURT: So you're concerned that maybe a report
17 that he said he --

18 MR. MULHOLLAND: Withdrawn.

19 THE COURT: Yeah.

20 MR. MULHOLLAND: And then we'll have to go back --
21 then the argument will be well, were they ever withdrawn, and I
22 -- we'll say, well, you can look at the records --

23 THE COURT: Well --

24 MR. MULHOLLAND: -- and if you piece together all
25 these things and these conferences, perhaps, yeah, you can

1 conclude that they were withdrawn, but all I want is an
2 explicit statement of that.

3 THE COURT: Well, look -- look, let's not -- let's
4 not dance around this. Are you -- I hear you to say that so
5 many of these cases fit within CVLO-7. There is a -- there is
6 -- there is a -- the discovery is still open in that particular
7 case. They have an opportunity to submit expert reports. Are
8 you saying that hypothetically, you could see some or -- one or
9 more of these reports filed in -- as expert reports in a CVLO-7
10 case, and you don't want to have to deal with it at that time?
11 Is that what you're saying?

12 MR. MULHOLLAND: That's one of the things I'm saying.

13 THE COURT: Okay. So I --

14 MR. MULHOLLAND: The other circumstances where these
15 reports could -- they could be -- they could resurface.

16 THE COURT: How so?

17 MR. MULHOLLAND: Okay. Let's suppose we're six
18 months down the line in a transferor Court ready to try one of
19 these 17 cases.

20 THE COURT: Yeah.

21 MR. MULHOLLAND: And -- and up pops the we think
22 withdrawn Schonfeld report. That's offered as an exhibit. We
23 would say well, oh, no, that's not right, because that report
24 was withdrawn.

25 THE COURT: Well, what's -- what's the circumstance

Colloquy

22

1 under which it's -- it's been resubmitted? What do you --
2 what's your -- in your hypothetical? Is it what -- is it
3 what --

4 MR. MULHOLLAND: That's in the context of a pretrial
5 order listing exhibits in a case down -- in a transfer -- in a
6 transferred case down the road.

7 THE COURT: All right. Well, okay.

8 MR. MULHOLLAND: Here is my -- here is -- here is --
9 the question I want to ask back is if, in fact, they have been
10 withdrawn, then what's the problem with saying that --

11 THE COURT: No.

12 MR. MULHOLLAND: -- in the record?

13 THE COURT: Right. Right. You know -- you know, I
14 think part of the problem with saying that is that you're
15 asking them to say it by sticking his face in the mud, and
16 frankly, maybe he doesn't want to do it that way. If you've
17 got what you got, you got what you got, but I -- I had -- I
18 also understood this the way that you have articulated it, but
19 I don't know -- I didn't go back and go through, you know, with
20 precision. The assumption I made I think is the assumption
21 that you made, which is an assumption that with respect to
22 those particular 17 reports, I assume they considered that
23 those reports had certain deficiencies in them, and they were
24 seeking to have them withdrawn.

25 Now, I would also -- I also understood that there

1 were -- it was implied to me, and I think it was implied to
2 you, and I think Mr. Setter made some previous reference to
3 this in last calls that they perhaps had further examinations
4 from Dr. Schonfeld or from Dr. Anderson, there was something
5 more that they had, they had more robust reports, it was built
6 up, something was -- happened, something happened, and that,
7 you know, you will deal with that as an expert causation report
8 in the case if they're properly filed in the -- in the, you
9 know, CVLO-6, CVLO-7, CVLO-5, the ones that have yet to come
10 forward, and then you're going to have to deal with that, and
11 if you think that those reports are such and the background of
12 those reports are such that they -- they can and they should be
13 challenged, then you mount your challenge.

14 MR. SETTER: Your Honor, Dave Setter. Just a couple
15 things that may help a little bit on this. I do believe in the
16 transcript that we have on the 23rd, you did ask Mr. McCoy
17 specifically that -- something to the effect that -- I'll
18 quote.

19 "You file new reports [this is you]. You know, maybe
20 without saying so directly, you want the defendants and the
21 Court to understand that you are withdrawing those reports
22 which had earlier been filed in support of A012 or in any other
23 purpose you would have presented them."

24 Mr. McCoy responds, "Causation reports, yes."

25 And I think we just are trying to articulate that in

Colloquy

24

1 your order to that effect, that, in fact, those reports that
2 relied on Schonfeld and Anderson that were submitted as part of
3 A012 or for any other purpose are withdrawn.

4 THE COURT: Okay.

5 MR. SETTER: I think that's -- that's clear.

6 THE COURT: Well --

7 MR. SETTER: The other point I would raise is --

8 THE COURT: -- apparently -- apparently, your
9 partner, Mr. Setter, doesn't think it's clear. Your partner
10 wants --

11 MR. SETTER: I think that is clear on that point, and
12 Mr. McCoy should hopefully agree to that.

13 THE COURT: Well, it sounds like he already did.

14 MR. SETTER: With respect to your proposed order, I
15 would note that CVLO-3 expert reports are not due from
16 plaintiffs until August 13th.

17 THE COURT: Okay.

18 MR. SETTER: I believe on the top ten cases, they are
19 not relying upon the causation reports for Schonfeld or
20 Anderson. We went through that in the last hearing as well as
21 CVLO-1 and 2. Mr. McCoy I believe at that point confirmed that
22 they were not relying upon Schonfeld/Anderson/Sadek causation
23 reports in the CVLO-1 and 2 cases.

24 So I think with respect to the SAS cases, the 50
25 cases that have been dismissed or reports have been redone and

1 the top ten cases in CVLO-1 and 2, the A012 reports for
2 Schonfeld, Anderson, and Sadek have been withdrawn, and I
3 believe that's the state of the record, and I would state that
4 I believe the issue with respect to the use of those A012
5 reports going forward for groups 3, 4, 5, 6, and 7, unless
6 they're covered as part of SAS-50 will have to be determined at
7 the time that the plaintiffs identify their expert reports.

8 THE COURT: Yeah. I agree with that. I agree with
9 that, and I have not -- your -- your proposed order was
10 submitted about a week -- well, let's see, about -- well, I
11 guess on --

12 MR. SETTER: On Friday.

13 THE COURT: Yeah. Last Friday. Okay. So it's five
14 or six days ago, and I have not gotten anything from the
15 plaintiffs that have -- anything back, any further comment back
16 upon it to -- to challenge it or to contradict it or, you know,
17 whatever.

18 My question only -- my issue only is -- is I just
19 don't know -- I just don't know, and frankly, I'm a little
20 disturbed about some of the -- I'm going to characterize it. I
21 don't see it as anywhere near the significance that Mr.
22 Mulholland does obviously, but, you know, it is -- it is what
23 it is, and I don't like being lectured to by counsel with
24 respect to some of the precise stuff that needs to be in an
25 order that we told you we are about to enter just to get a

1 general reaction.

2 That's my judgment, and -- but I will make an effort
3 to try to address some aspect of this in some fashion in
4 connection with the order, and I do see that there is certainly
5 a possibility that you may have to face a -- a report from
6 Schonfeld and Anderson that deals with certain plaintiffs in
7 some of the later cases, and they may well have been related to
8 or, you know, something with the A012 reports. I don't know
9 the answer to that, but if they're beefed up and they're more
10 substantial, then, you know, they are what they are. You know,
11 your -- I'm just -- there is not much more I can say.

12 What I'm more interested in is whether or not -- what
13 you see with respect to the management of this, and, you know,
14 because we -- because -- because we -- I'm not sure that
15 everybody was on the exact same wave length as to exactly what
16 you -- what we all saw about how this limine motion would go
17 and how is that impacted by this change in the scheduling
18 order.

19 I'm doing my best to try to conform this to a way
20 that gives everybody an opportunity to tee up the important
21 limine issues that go directly to causation that would be very
22 relevant for summary judgment, and I am not -- and I'm not
23 going to do it as a separate limine motion, because that's not
24 the way Judge Robreno wants to do it for good and sufficient
25 reason. We have to deal with different kind of management

Colloquy

27

1 issues in MDL litigation. So we're going to do it in the
2 context of the summary judgment.

3 Now, what I would envision would be -- and I haven't
4 talked to Judge Robreno about this, but what I would envision
5 would be that if you raise a particular motion with respect to
6 Schonfeld or Anderson, you have a broad breadth of -- a
7 substantial breadth of discovery that you obtained as a result
8 of -- as a result of the more expansive discovery that you are
9 permitted to undertake in connection with this process. That
10 discovery has been completed. You have opportunity to assemble
11 it and do whatever it is that you do, and it may well be that
12 the questions that you may want to raise with respect to these
13 gentlemen are questions which would have to be resolved at a --
14 at a hearing, and it may well be that Judge Robreno would want
15 to conduct a hearing with respect to it. He may feel that he
16 doesn't need to. He may want to react to it based upon
17 affidavits. He may want to do a hearing himself. He may want
18 to refer the matter to me to do a hearing. I don't know
19 exactly how he's going to want to handle that, but what I do
20 know is that he was -- he came to be convinced and satisfied
21 with setting apart this SAS issue based upon the determinations
22 that we made back last fall and to the extent that the volume
23 and the quantity of cases does not seem to justify that process
24 now, we're going to go back and deal with the new reality, and
25 the new reality puts us to where we would otherwise be with

1 respect to any other expert and with respect to any other
2 significant causation related issue that would normally be a
3 limine issue will be a limine issue in the context of the
4 filing for motions for summary judgment, and that's the way
5 that I see it.

6 Now, you -- you want to -- you want to -- some of the
7 predicates that you have in here, I don't -- I don't know that
8 I saw them as -- I think they're worthwhile as background.
9 They describe some of the history. You want to get something
10 to me to -- frankly, I don't -- do we have the transcripts of
11 the -- of the last session? Okay. You want to direct me to
12 the particular context of the information that has Mr.
13 Mulholland so concerned, you -- you do that, and I'll make
14 determinations whether I want to do anything with it specific
15 or not. My instinct is I don't think it's necessary, but that
16 doesn't -- you know, whatever -- whatever Mr. McCoy said he
17 said, and however it's going to be dealt with in a subsequent
18 case, you know, that's the future.

19 Is there anything other -- any other specific aspect
20 of this, Mr. Setter or Mr. Mulholland, you want to bring to my
21 attention on this point?

22 MR. SETTER: Your Honor, no. I just did point out
23 that -- that the timing dates in terms of the expert reports on
24 -- under the other scheduling orders, in our proposed order, we
25 try to comply with that to make it consistent with the other

Colloquy

29

1 scheduling orders, and --

2 THE COURT: Yeah.

3 MR. SETTER: -- hopefully, that -- that was done in
4 terms of when they have to produce their expert reports.

5 THE COURT: Yeah. I understand that. I understand
6 that, and we'll -- we will -- we will do that.

7 MR. SETTER: And I think in reality, we need to hear
8 from the plaintiffs. I think it's true that we don't have this
9 issue with respect to the top ten cases and CVLO-1 and 2, and I
10 believe we had that concession by Mr. McCoy last time.

11 MR. CASCINO: Your Honor --

12 MR. SETTER: So we're dealing with CVLO-3 cases on.

13 MR. CASCINO: Your Honor, this is Mike Cascino. It
14 has to be done a case-by-case basis, and I don't know what the
15 case-by-case basis is without the specific case in front, but I
16 can tell the Court that there are now instances where Dr.
17 Schonfeld has gone back and after having done the hands-on
18 physical on the person, you know, three, four, five, or ten
19 years ago, he's now gone back and he's done full, you know,
20 reports on them and relying on his -- on -- as an expert, and
21 one of the things he does rely upon, I believe is -- is his
22 prior examination that he did of the person when he is making a
23 new causation letter for a particular case.

24 THE COURT: All right.

25 MR. CASCINO: So, again, my point is that you can't

Colloquy

30

1 just like, you know, throw out -- say that this applies in all
2 these cases. It has to be a case list. I mean, you know, and
3 it is what it is what it is, and, you know, that's -- and the
4 same thing with Dr. Anderson. Dr. Anderson is doing some of
5 the new causation reports, and he may refer to his old reports.
6 I'm not sure, but he may refer to it as well.

7 So it's -- technically, it's not really withdrawn.
8 It's simply that, you know, he's going further as an expert,
9 making a causation that's going to be acceptable, you know, to
10 the Court.

11 THE COURT: Right. Well, you know, as a matter of
12 fact, Mr. Cascino, that -- I appreciate that and I understand
13 that, and I agree with you that that would be -- likely would
14 be permissible to do, and I also agree with you that whatever
15 information previously he had he may wish to rely upon, and
16 maybe that's -- you know, I'm not so sure what Mr. Mulholland
17 had in mind beyond that or if his effort was to try to have
18 those particular experts precluded even from having
19 supplemental reports, and I didn't flush that out. Mr.
20 Mulholland, if that's what you're intending, that's not -- that
21 would not be appropriate in my view with respect to the -- to
22 the subsequent cases.

23 So maybe having heard that, I understand a little bit
24 better maybe where this is going. All right.

25 MR. MULHOLLAND: I, of course, never have said that

Colloquy

31

1 and never have taken that position nor did our proposed order
2 take that position nor do I think that would be right.

3 THE COURT: Good. Okay. So --

4 MR. CASCINO: Your Honor, I'm -- this is Mike
5 Cascino. On the Daubert issue, I mean, right now, we complied
6 with the Court's order, and we got in our two experts or
7 whatever we're relying upon on July 16th. Our -- our -- the
8 Court had indicated something earlier in the call. Are they to
9 file their Daubert -- continue to be filing their Daubert
10 motions on August 10th, and are we staying with the scheduling
11 order that the Court previously made, which is what the
12 plaintiffs' position is?

13 THE COURT: No. I think I've -- I didn't -- well, I
14 didn't realize that was the plaintiff's position, but -- and
15 nonetheless, the answer is no. I've already said there is no
16 justification in my mind for continuing the -- the SAS
17 scheduling order the way in which it has presently been
18 drafted, but the -- these motions will be dealt with in the
19 context of individual cases and in the context of individual
20 scheduling orders, and -- but --

21 MR. CASCINO: So --

22 THE COURT: -- but they're -- but to the extent that
23 there are -- there are motions for summary judgment that have
24 already been filed and are already -- that are pending, that we
25 are going to enter an order that will require those motions for

1 summary -- summary judgment to be supplemented to the extent
2 that in any of those cases, the defendants -- you folks are
3 relying upon Schonfeld and Dr. Anderson, and you folks -- and
4 the defendant feels that they're unreliable in connection with
5 whatever reports they did in those cases, they will be directed
6 to file motions for summary judgment with -- to supplement
7 their motions for summary judgment to reflect that position.
8 Is that clear enough?

9 MR. CASCINO: And I don't mean to be a pest, Your
10 Honor. So those are -- they'll file those on whatever group of
11 cases there are that those apply to on August 10th, and we'll
12 have our 21 days to respond to that as the prior scheduling
13 order permitted?

14 THE COURT: Yeah. Probably. I'm not -- I'm not -- I
15 want to take a look at that. I'm not -- I think if it was 21
16 days, that's probably what we might do. Yeah.

17 MR. CASCINO: That's what we had before, and we had
18 asked for more time before, but we can live with 21 days.

19 THE COURT: Yeah. All right. Okay. I don't think
20 that's unreasonable. Okay. Anything else on this call?

21 (No audible response)

22 THE COURT: I did -- I want to just make a couple of
23 comments at the -- at the risk of opening up another can of
24 worms here, but it was reflected upon today in the earlier call
25 by -- I guess it was Mr. Capshandy -- the -- and I guess -- and

1 I understand is the subject of -- of a motion filed or to be
2 filed, and I was trying to see if I could an accelerated
3 response so it could be -- it could be dealt with.

4 I have been back through a couple of the previous
5 opinions that Judge Robreno has written with respect to efforts
6 to utilize declarations or affidavits from certain witnesses
7 who had not been previously disclosed or not adequately
8 previously disclosed, and these were affidavits that were
9 submitted in an effort to oppose motions for summary judgment.
10 One particular case I am thinking of where he talks about some
11 of these discovery issues is -- what was the name of it?

12 THE CLERK: Hang on a second.

13 THE COURT: And you might want to take a count of --
14 of this and look at some of this case, which I think I would
15 consider to be persuasive with respect to these questions. The
16 name of it is Joseph Morgan and Lisa Bowling v. 3M. It is
17 civil action number 8 -- 10-84925, an order of December the 22,
18 2011, and in it, he reflects upon some of the difficulties with
19 -- with respect to that and ends up striking the affidavit, and
20 some of the tussling back and forth that we had with respect to
21 the question of the supplementation of the interrogatories that
22 was -- took up some time on -- on July the 13th dealt with the
23 -- dealt with that, and I think I did reflect in the order that
24 we subsequently entered I declined to quash that submission,
25 but I put in the -- in the order and the opinion in connection

1 with the order -- I forget if it was a footnote order or a
2 short memorandum opinion, but I put language in there where I
3 intended to make it clear that those submissions in and of
4 themselves were obviously -- to me obviously -- I'm sure to
5 defendants obviously a far cry from establishing adequate
6 causation, and to the extent that if the plaintiff has a
7 thought that simply presenting a declaration from somebody
8 whose name might appear on that sheet in connection with an
9 opposition to motion for summary judgment as a discovery matter
10 would appear to me to be very inappropriate, and if they expect
11 to rely upon some such affidavit or declaration, some such
12 thing or some such witness, they need to do a much more
13 substantial disclosure within the context of the time period
14 for discovery such as to give the defendants an opportunity to
15 challenge that evidence if they choose to do so by way of
16 deposition.

17 And you might well consider to the extent this comes
18 before Judge Robreno, what his determination would be with that
19 kind of information, and I think this particular opinion would
20 give you some guidance. It is true that there were other
21 situations where Judge Robreno did allow affidavits, but my
22 recollection is they were situations that were factually quite
23 a bit different, and I think if you take a look through some of
24 the jurisprudence that he's developed in some of these areas,
25 it might help guide the parties in terms of how you're all

1 going to be proceeding.

2 Okay. So if that's all we have, we will stand
3 adjourned, and I do not see -- and anybody else feel that we
4 have a need to rehash through any of this again or what -- the
5 10:00 tomorrow morning call?

6 MR. MCCOY: Judge, Bob McCoy. One thing I heard at
7 the beginning of this would be you said something about there
8 gave been informal briefings on the scheduling order adjustment
9 so far.

10 THE COURT: Yes.

11 MR. MCCOY: Have a chance to do a formal
12 presentation. I just want to make sure that we had -- that is
13 what we have to do then is make a more formal presentation.

14 THE COURT: I don't -- you know, this thing came up.
15 We discussed it at some length on July 13th. We took -- took
16 its measure. You guys had some discussion. You folks had some
17 discussion amongst yourselves for a bit. I took, you know,
18 submission that you provided, Mr. McCoy. I took a submission
19 that was provided by Ms. Studebaker. I sat down with them and
20 reflected upon them, and we've also discussed this, I think, in
21 previous calls to some extent.

22 I think I have the information that I need. I don't
23 need to formalize this, and I'm not going to slow down the
24 process any further with respect to this. I just don't think
25 it's -- it's appropriate given everything that you all and --

Colloquy

36

1 and I have to do in connection with these cases.

2 MR. MCCOY: All I'm -- all I'm saying, Judge, is we
3 would -- we would want to make a formal presentation to the
4 extent that this has so far been informal.

5 THE COURT: Well, all right. You -- you can file
6 whatever you want to file, but I'm going to --

7 MR. MCCOY: That's all I'm asking for.

8 THE COURT: I'm sorry.

9 MR. MCCOY: I was just asking for -- that we be
10 allowed to file it. I understand what Your Honor has said.

11 THE COURT: Okay. Okay. All right. Thank you very
12 much, folks.

13 MR. FERGUS: Your Honor, one quick thing. This is
14 Shawn Fergus. I just need to make my appearance.

15 THE COURT: Okay.

16 MR. FERGUS: I joined the -- I joined the call late.
17 I'm joining for John Crane and Cleaver-Brooks.

18 THE COURT: All right. Thank you, Mr. Fergus.

19 MR. FERGUS: One other question, Your Honor. Who do
20 we contact with regard to obtaining a copy of the transcript
21 for today and last week?

22 THE CLERK: He can e-mail me, and I'll send him the
23 information.

24 THE COURT: Send an e-mail to Lauren, my -- my law
25 clerk or to Joel.

Colloquy

37

1 MR. FERGUS: Will do. Thank you, Your Honor.

2 THE COURT: You know how to do that?

3 MR. FERGUS: Yes.

4 THE COURT: Okay. Thank you.

5 (Proceedings concluded at 5:34 p.m.)

6 * * * * *

7 C E R T I F I C A T I O N

8 I, Maureen Emmons, court approved transcriber,
9 certify that the foregoing is a correct transcript from the
10 official electronic sound recording of the proceedings in the
11 above-entitled matter.

12

13 _____ Date:

14 MAUREEN EMMONS

15 DIANA DOMAN TRANSCRIBING

16